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EXAMINER

DEXTER, CLARK F

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Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte RICHARD S. CHOMIK, JOESEPH CLARK, and
FRANCIS X. MANGANIELLO

Appeal 2007-0792
Application 09/639,508
Technology Center 3700

Decided¹: March 17, 2009

Before JAMESON LEE, CAROL A. SPIEGEL, and SALLY C. MEDLEY,
*Administrative Patent Judges*².

MEDLEY, *Administrative Patent Judge*.

DECISION ON REHEARING

¹ The two-month time period for filing an appeal or commencing a civil action, as recited in 37 C.F.R. § 1.304, begins to run from the decided date shown on this page of the decision. The time period does not run from the Mail Date (paper delivery) or Notification Date (electronic delivery).

² Administrative Patent Judge Teddy S. Gron authored the June 14, 2007 Decision. Judge Gron retired. Administrative Patent Judge Sally C. Medley replaces him on this panel. *Cf. In re Bose Corp.*, 772 F.2d 866, 869 (Fed. Cir. 1985).

A. Introduction

Playtex Products, Inc. (“Playtex”), the real party in interest, requests rehearing under 37 C.F.R. § 41.52 of the Decision on Appeal entered June, 14, 2007 (“Decision”).

Playtex seeks reconsideration of the Decision on two grounds: (1) that the Board’s interpretation of “centerlines coincident to a radius” is unreasonable, and (2) the Board’s affirmance of the rejection of claims 14-16 is erroneous. Reh’g Req. 7.

The request for rehearing is denied.

B. Discussion

A request for rehearing must state with particularity the points believed to have been misapprehended or overlooked. Arguments not raised in the briefs before the Board and evidence not previously relied upon in the briefs are not permitted in the request for rehearing. 37 C.F.R. § 41.52 (a)(1).

Playtex argues that the construction of the meaning of the phrase “centerlines coincident to a radius” is not reasonable because it overlooks or is not based on enough or all of the pertinent information, including the claims, specification, prosecution file history, and a dictionary. Playtex further argues that the Decision misapprehends the meaning intended by Playtex and is unfair to Playtex. Reh’g Req. 7-8.

In essence, Playtex disagrees with the claim interpretation expressed in the Decision. A request for rehearing is not an opportunity to express disagreement with a decision. Rather, a request for rehearing is limited to directing attention to overlooked or misapprehended arguments previously made or evidence previously submitted. Playtex did not, in its Appeal Brief

or its Reply Brief, present the arguments that it makes in its rehearing request regarding claim interpretation. Playtex waived these arguments and we need not consider them.

In any event, we make the following observations regarding Playtex's request for us to modify the Board's interpretation of "centerlines coincident to a radius." Playtex has consistently maintained that Claims 14-16 stand or fall together. App. Br. 8:4; Reply 2-4; Reh'g Req. 3:4. Pursuant to 37 C.F.R. § 41.37(c)(1)(vii), the panel of the Decision chose claim 14 as the representative claim. Decision 3:3-5. Claim 14, reproduced from the claims appendix of the Appeal Brief, is as follows:

A method of forming a plurality of apertures in a concavely curved domed portion of a vent disc, said plurality of apertures each having centerlines, which comprises:

forming said plurality of apertures with each of said centerlines coincident to a radius that forms a concave curvature of said domed portion, wherein said plurality of apertures have at least two different diameters through said domed portion, wherein said plurality of apertures are resealable, and wherein said domed portion is elastomeric.

In the Decision, it was determined that the phrase "centerlines coincident to a radius that forms a concave curvature of said domed portion" means that the centerlines are aligned with a corresponding radius extension of the domed portion of the disk. It was further explained that "[t]hat means that an extension of the radius drawn to an aperture would fit entirely within the aperture." Decision 6:5-8. Playtex seeks modification of the above quoted sentence to read "[t]hat means an aligned extension of the radius of curvature of the concave dome drawn to an aperture would align entirely with the centerline of the aperture."

The proposed modification is rejected, since it is based on a misunderstanding of the express claim language of claim 14. Claim 14 recites “forming a plurality of apertures . . . said plurality of apertures *each having centerlines . . .*”. Claim 14 requires each of the apertures to have a plurality of centerlines. Claim 14 does not require that each aperture have only a single centerline as Playtex suggests.

As explained in the Decision, multiple centerlines of each aperture must be coincident to the same radius forming the concave curvature of the domed portion. Each aperture in Greenwood, such as that shown in Figure 17, has a plurality of centerlines extending radially from the inside surface of the domed portion at the periphery of the aperture. All that is required of the claim is that the plurality of centerline extensions be coincident with a radius that forms the concave curvature of the domed portion. That condition is met by Greenwood because the radius extension fits entirely within the centerline extensions from the aperture. In that regard, the Decision states on page 6: “Greenwood’s Figure 17 depicts an aperture that reasonably appears to contain the radius of the curvature of the domed portion of the disk throughout its thickness.” Playtex’s argument incorrectly assumes only a single centerline in each aperture.

For these reasons, we will not modify the Decision in the manner suggested by Playtex, since doing so would be contrary to the express language of claim 14.

Playtex’s second ground for rehearing is that the Board has misapprehended or overlooked the fact that there is no teaching in Greenwood of the step of “forming a plurality of apertures with each of its

centerlines coincident to a radius that forms a concave curvature of said domed portion.” Reh’g Req. 27 (emphasis in original).

Playtex argues that the Board’s findings that Greenwood “reasonably appears” to describe the disputed claim limitations is not sufficient for anticipation under § 102 rejection. Reh’g Req. 23-24. Playtex argues that the Board’s reliance on *In re Aslanian*, 590 F.2d 911, 914 (CCPA 1979) for the holding that drawings are evaluated on the basis of what they reasonably disclose to one skilled in the art is not applicable because *Aslanian* involves a § 103 rejection, not a § 102 rejection. Reh’g Req. 26. Playtex disagrees with the Board’s application of the law, which is not an appropriate basis for rehearing. As stated above, a request for rehearing is not an opportunity for an Applicant to express disagreement with the Decision of the Board.

Moreover, Playtex makes no meaningful attempt to explain why the holding in *Aslanian* is limited to a § 103 rejection, nor does Playtex cite subsequent case law that limits the holding in *Aslanian* to § 103 rejections. According to 37 C.F.R. § 41.52 (a)(1), a request for rehearing must state with particularity the points believed to have been misapprehended or overlooked by the Board. Playtex has failed to explain with any particularity how the Board misapprehended *Aslanian*.

Playtex also argues that Greenwood does not anticipate claim 14 because Greenwood’s figure 17 does not disclose more than one aperture. Reh’g Req. 24, 27-28. Playtex did not raise this argument in its briefs, and therefore we need not address it. In any event, the argument is without merit. Greenwood describes that Fig. 17 “is an enlarged fragmentary vertical sectional view taken through a single diaphragm aperture in the diaphragm of Fig. 15.” Greenwood col. 3:21-23. One of ordinary skill in

the art would readily appreciate that Fig. 17 is exemplary of just one of the plurality of apertures shown in Fig. 15. One of ordinary skill in the art would readily appreciate that any one of the apertures of Fig. 15 is specifically shown in Fig. 17, and that each one of the plurality of apertures of Fig. 15 would resemble that which is shown in Fig. 17.

Playtex argues that Greenwood does not expressly, implicitly or inherently disclose “forming said plurality of apertures with each of said centerlines coincident to a radius that forms a concave curvature of said domed portion”. Reh’g Req. 25-28. Playtex argues that the Decision misapprehended or overlooked the fact that Greenwood discloses a single perforation [73] formed with a push-pin in the apex region of a hemispherical recess [74], and that the single perforation, i.e., single centerline, is not necessarily coincident to a radius that forms a concave curvature of the domed portion. Playtex directs attention to the declarations of inventors Mr. Manganiello and Mr. Chomik in support of the argument and as evidence that was allegedly overlooked. Reh’g Req. 25-28.

Playtex’s argument and evidence were not misapprehended or overlooked. The argument and evidence are not commensurate in scope with the language of claim 14, and as such were not considered persuasive since they were not particularly relevant or helpful in rendering the Decision. As explained above, claim 14 requires that each of the apertures have a plurality of centerlines, and not that each aperture have a single centerline as Playtex suggests. Moreover, Greenwood’s hemispherical recesses [74] in combination with perforations [73] meet the limitation of a plurality of apertures. Playtex’s arguments are based on Greenwood’s perforation [73] alone as corresponding to the claimed “aperture” (Reh’g

Req. 24-25), while the Board finds both the hemispherical recess [74] and perforation [73] depicted in figure 17 to meet the “aperture” limitation.³ Decision 5. Accordingly, Playtex’s argument, and inventor declarations, which narrowly focus on the perforations [73] having a random point of entry and angle (i.e., *a single centerline*) do not account for that portion of the aperture defined by Greenwood’s hemispherical recesses [74] that have a *plurality of centerlines*.

C. Conclusion

The request for rehearing is denied.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a).

REHEARING DENIED

³ In contradiction to its argument that the apertures are confined to Greenwood’s perforations, we note that Playtex explains (App. Br. 5:15-16; Reh’g Req. 6:1-2) that its plurality of apertures are described in its application by reference numerals 18 and/or 20, which is an arrangement similar to the one depicted in Greenwood of perforations [73] and recesses [74].

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